IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

LORI ANN FOX,	)	CIVIL ACTION NO. 5:02CV00073
	)	
Plaintiff,	)	
	)	
v.	)	MEMORANDUM OPINION
	)	
BARBARA M. FORRESTER,	)	
Executrix of the Estate of	)	
J. Albert Forrester, Decedent,	)	
	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

The plaintiff in this action seeks damages for the alleged negligence of the defendant and punitive damages for the alleged gross negligence of the same. The defendant, for her part, has filed a counterclaim alleging the contributory negligence of the plaintiff and also has filed a motion to dismiss. After a thorough examination of each party's objections, the supporting memoranda, the applicable law, and the Report and Recommendation, this court adopts the recommendation of the magistrate judge to deny the defendant's motion to dismiss and his recommendation to dismiss the defendant's counterclaim against the plaintiff in accordance with the stipulation of the parties. The court further holds that the defendant may not present any evidence with respect to the issue of contributory negligence at trial.

I. FACTS

The court adopts the magistrate judge's recitation of the facts. Those facts most pertinent to this decision are briefly summarized here. The action arises from a traffic accident in Bentonville, Virginia occurring on August 23, 2000. As J. Albert Forrester entered the town of Bentonsville at approximately 7:20 p.m. that day, he crossed the solid double yellow line of a two-lane highway to pass at least three vehicles. The defendant, the executrix of Forrester's estate, has admitted that during this maneuver the

decedent was speeding, and eyewitness testimony has indicated that his speed exceeded sixty, if not seventy, miles an hour in the no-passing zone.

At the same time, Lori Ann Fox, the plaintiff, approached the intersection of State Route 613 with Route 340, the route which the defendant was traveling. Ms. Fox, oblivious to the danger, then turned into the path of Mr. Forrester, whose truck struck her van twenty-five feet from the intersection. The plaintiff was injured by the episode, and Mr. Forrester died as a result of his injuries shortly thereafter.

Ms. Fox then brought suit against Mr. Forrester alleging that his negligence caused various injuries, including some that required hospitalization. Prior to the initiation of this suit, Barbara M. Forrester was appointed executrix of Mr. Forrester's estate in Pennsylvania. The parties dispute whether notice of the negligence claim was presented to the estate in a timely manner. More specifically, the parties both seem to agree that actual notice was provided the estate but disagree about the legal sufficiency of such notice with respect to the Pennsylvania nonclaim statute. It is enough for purposes of this opinion to note that a reasonable fact finder could conclude that the executor received actual notice of the claim within a year of the publication notice.

II. PROCEDURAL POSTURE

The plaintiff instituted this action in the Circuit Court of Warren County, Virginia on July 15, 2002, and the defendant subsequently removed the case to this court on August 8, 2002. On the same day, the defendant filed a counterclaim alleging contributory negligence on the part of the plaintiff. On August 14, 2002, the case was referred to the magistrate judge. On June 12, 2003, the defendant, Barbara M. Forrester, the executrix of the estate of J. Albert Forrester, moved for summary judgment. She asserted three grounds for this motion: 1) that plaintiff's claims are barred by Pennsylvania probate law requiring that notice of claims against Pennsylvania estates be filed within one year after the first complete advertisement

of the grant of administration; 2) that a claim for punitive damages against the decedent's estate cannot lie; and 3) that the plaintiff was contributorily negligent. The defendant asserted the last defense in addition to her counterclaim based on the same theory.

In his report filed July 31, 2003 ("Report and Recommendation"), the magistrate judge recommended that the defendant's motion to dismiss be denied. First, the magistrate judge correctly noted that the parties have stipulated to the dismissal of the plaintiff's counterclaim. He recommended that this court enter the order to which both parties agreed. Related to this stipulation, he also recommended that no evidence on the issue of contributory negligence be admitted at trial. Second, he relayed his understanding that the plaintiff had withdrawn her claim for punitive damages. Third, the magistrate judge isolated the applicability and effect of the Pennsylvania nonclaim statute as the outstanding issue of the motion to dismiss. The defendant has filed timely objections to the Report and Recommendation.

III. STANDARD OF REVIEW

According to § 636(b)(1)(C), this court "shall make a de novo determination of those portions of the report . . . to which the objection is made." 28 U.S.C. § 636(b)(1)(C) (2000). A party is entitled to summary judgment when the pleadings and discovery show that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[S]ummary judgment . . . is mandated where the facts and the law will reasonably support only one conclusion." *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 279 (4th Cir. 2000) (quoting *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991)). If the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party, then there are genuine issues of material fact. *See Anderson*, 477 U.S. at 248. All facts and inferences shall

be drawn in the light most favorable to the nonmoving party. *See Food Lion, Inc. v. S.L. Nusbaum Ins. Agency, Inc.*, 202 F.3d 223, 227 (4th Cir. 2000).

IV. DISCUSSION

The defendant raises three objections to the Report and Recommendation. First, the defendant asks that the Report and Recommendation be amended to reflect the plaintiff's inability to recover punitive damages. The court observes that the plaintiff has already withdrawn her claim, rendering this objection moot. Second, the defendant objects to the finding that Ms. Forrester was given notice of the claim against the estate in accordance with the Pennsylvania nonclaim statute. Third, the defendant claims that, notwithstanding the stipulated agreement to dismiss the defendant's counterclaim, the magistrate judge should not have recommended that the related defense of contributory negligence be excluded at trial. Raising essentially a procedural charge, the defendant cites *U.S. Development Corp. v. Peoples Federal Savings and Loan*, 873 F.2d 731 (4th Cir. 1989), for the proposition that a party must be given ten days notice before summary judgment can be entered sua sponte. The cited case involved an exceptional circumstance in which a district court entered judgment sua sponte in the same order that permitted the claim to be added to the complaint. Here, the defendant initiated the claim and its corresponding defense and has presented the court with a memorandum regarding the same. In contrast to the case cited, the complaint in this case was not amended to add an additional claim that the opposing party never had an opportunity to answer prior to judgment. Furthermore, the defendant was the recipient of an exhaustive motion to dismiss the counterclaim for contributory negligence, a counterclaim animated by the same theory as the defense of contributory negligence. Finally, in this case, the defendant has been given the required ten-day notice by Federal Rule of Civil Procedure 72(b), which provides the ten-day notice on its very terms. The court notes that the defendant fails to raise in his objection any substantive basis for ignoring

the magistrate judge's recommendation. Therefore, the third objection is overruled, and the court is left with the defendant's second objection, which goes to the issue isolated by the magistrate judge in the Report and Recommendation.

Three primary issues are then presented by the defendant's second objection, i.e., that the Pennsylvania nonclaim statute bars this action. The court first considers whether it should decline jurisdiction over this matter given the pendency of the Pennsylvania probate proceedings. The court next addresses whether Pennsylvania probate law should be given extraterritorial effect. The court concludes that it should retain jurisdiction and that the nonclaim statute should not be granted extraterritorial effect in this case. Finally, the court addresses the contributory negligence counterclaim and defense offered by the defendant.

A. Abstention from Probate Proceedings

The magistrate judge properly determined that this court has subject matter jurisdiction over the case before it. "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different States . . . ." 28 U.S.C. § 1332(a). The suit involves diverse citizens, one from Virginia and the other from Pennsylvania, and the amount in controversy exceeds six million dollars. The court has personal jurisdiction over the executor of an estate pursuant to Virginia's long-arm statute, VA. CODE ANN. §§ 8.01-328, 8.01-328.1 (Michie 2000), and the Supreme Court's minimum-contacts jurisprudence. *See Crosson v. Conlee*, 745 F.2d 896, 901 (4th Cir. 1984). Moreover, the parties do not dispute this court's personal jurisdiction.

It is well established that a federal court has no jurisdiction to probate a will or administer an estate. *Markham v. Allen*, 326 U.S. 490, 494 (1946). The scope of this "probate exception," however, is narrow:

> [F]ederal courts of equity have jurisdiction to entertain suits "in favor of creditors, legatees, and heirs" and other claimants against a decedent's estate "to establish their claims" so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court.

Id. Here, the plaintiff has asked the court to determine liability relating to the accident in Virginia. The mere fact that the court is asked to establish a claim against an executor does not raise the jurisdictional bar of the probate exception. The court has not been asked to assume control of the Pennsylvania probate proceedings and therefore is not limited by the probation exception.

Notwithstanding the court's subject matter and personal jurisdiction over this claim, this court finds it proper to question whether it should decline jurisdiction given the existence of probate proceedings in Pennsylvania. Abstention is a prudential doctrine applicable in limited circumstances. Indeed, the Supreme Court has described the obligation of federal courts to adjudicate claims within their jurisdiction as "virtually unflagging." *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 359 (1989) (hereinafter "*NOPSI*") (citing *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988)). The Court has also rejected extension of the abstention doctrine to cover *all* civil proceedings, lest the exception swallow the rule. *Id.* at 368. Here, adjudication of a claim between a third party and the decedent's estate will not disrupt the state's interest in the timely and efficient functioning of its estate administration apparatus. Significantly, the plaintiff in this case seeks only compensatory damages and not the equitable relief that often triggers concerns related to comity. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 13.3, at 824 (4th ed. 2003).

One decision issued by the Court of Appeals for the Fourth Circuit, however, has applied a form of abstention analysis to reach the conclusion that a district court should have declined jurisdiction where a nonclaim statute would have operated to bar a claim against a foreign estate. In *Crosson v. Conlee*, the plaintiff brought a breach of employment contract action against the executor of his former supervisor's estate. 745 F.2d at 898. Notice of administration of the estate was published in a newspaper local to the domicile of the estate, in Florida. *Id.* at 899. While the plaintiff had filed his complaint in court in a timely manner, he had not complied with Florida's nonclaim statute, which required the filing of claims against the estate within three months of the publication notice. *Id.* The court of appeals determined that although the nonclaim statute did not contravene the longer Virginia statute of limitations, any potential award would be rendered a "practical nullity." *Id.* at 903. It observed that "[i]t is settled law that enforceability and the effect to be given a judgment against a nonresident executor must be determined by the courts of the state where probate proceedings are pending." *Id.* Therefore, based on the court of appeals understanding of the Florida nonclaim statute, a Florida court would be required to reject the claim once it was brought against the estate, even though the judgment would not be subject to challenge on the merits. *Id.* Given the futility of this exercise, the court of appeals reasoned, the district court should have "declined jurisdiction." *Id.* at 903-04.

The *Crosson* decision does not require this court to abstain from the matter at hand. First, while it is not the place of this court to disturb the precedent of the court of appeals, it is important to note that *Crosson* predates the *NOPSI* decision by several years. Although the decision does not expressly articulate an abstention rationale for declining jurisdiction—indeed, the opinion could perhaps be more fairly characterized as having been predicated upon the mootness doctrine—the court concerned itself a great deal with ongoing state proceedings. Had the court of appeals been apprised of the Supreme Court

jurisprudence that has since emerged, it is conceivable that the outcome of the case might have been different. Similar to the plaintiffs in the case at bar, the *Crosson* plaintiffs did not request injunctive relief, and therefore the court could not be characterized fairly as "interfering" with ongoing state proceedings by adjudicating a claim. It is therefore unclear whether the state's admitted interest in the efficient administration of its estate was, or would be, affected to the extent required for abstention. In this case, for instance, it is unlikely that resolution of this dispute would "needlessly deter a prudent executor from final disposition of the estate." *Id.* at 903; *see, e.g.*, 20 PA. CONS. STAT. ANN. § 3389 (West 2003) (directing that the probate court may make equitable provision for the distribution or satisfaction of claims being litigated in another state or federal court).

Notwithstanding the *Crosson* decision, this court has decided to retain jurisdiction over this case. First, the *Crosson* court did not reject the possibility that a case involving insurance might warrant a different outcome.[1] *Crosson*, 745 F.2d at 903 (citing *Propst v. Fisher*, 313 F.2d 248 (6th Cir. 1963)). As the magistrate judge notes, the claim in this case might be satisfied without resort to the assets of the estate, as the parties do not dispute the existence of adequate insurance to cover the claim. The claim in *Crosson* was a contract claim which could be satisfied only by the assets of the estate. Second, the premise of the rule cannot be conclusively established in this case, as it is not clear that a Pennsylvania court would automatically find this particular claim barred.

---

[1] The court also noted a second exception not applicable to this case. That exception permitted suit when the judgment could be satisfied by resorting to assets located within the forum state. *Crosson*, 745 F.2d at 903. More generally, the *Crosson* opinion suggested the matter before the court at the time could be confined to its "unusual circumstances." *Id.*

The second point, that an award of damages in the current matter would not be conclusively barred by the Pennsylvania nonclaim statute can be supported on several grounds. The Pennsylvania nonclaim statute operates in a fashion similar to the Florida statute at issue in *Crosson*. After a notice is published in a local newspaper, claimants are charged with constructive notice and must submit claims within a year to avoid the statutory bar. Specifically, the statute provides that, in the case of claims against personal property,

> [n]o claimant shall have any claim against personal property distributed by a personal representative at his own risk . . . unless the claim of such claimant is known to the personal representative within one year after the first complete advertisement of the grant of letters or thereafter but prior to such distribution.

20 PA. CONS. STAT. ANN. § 3532 (West 2003). When one takes into account the plain language of this provision in addition to a parallel provision requiring *written* notice in the case of real property, the court reaches the inescapable conclusion that a Pennsylvania court could decide that the actual notice alleged by the plaintiff permits the admission of the claim against the personal representative, or against the estate.[2] Additionally, in 1989, some five years after the *Crosson* opinion, the Supreme Court held that due process requires the use of mail service in this setting to notify "reasonably ascertainable" claimants of the probate proceedings and the running of the nonclaim statute. *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485

---

[2] This conclusion is buttressed by yet another parallel provision, which permits a personal representative to avoid liability for improper distribution of the estate by issuing written demands to potential claimants. If the claimant does not respond to this missive after a certain amount of time, her rights are forgone. The executor in this case chose not to exercise this option.

The court notes that the posture of this case requires the factual issue of notice to be resolved in favor of the nonmoving party, here, the plaintiff.

U.S. 478, 489-90 (1988) (requiring actual notification of reasonably ascertainable claimants despite the executor's compliance with provision for notice by local publication). The executor in this case did not notify the plaintiff of the running of the nonclaim statute by any means other than the publication notice. Moreover, the particular severity of the accident and other facts surrounding the incident suggest that the plaintiff in this case was a "reasonably ascertainable" claimant. Therefore, a Pennsylvania court presented with a "belated" claim could conclude that such claim is not barred by the statute consistent with due process. Finally, a Pennsylvania court could conclude that claims against insurers of the decedent are not controlled by the nonclaim statute.[3] Without deciding any of these matters definitively, it is clear to the court that the fundamental premise of *Crosson*—that the claim would not, or could not, be enforced by the foreign jurisdiction—simply does not *necessarily* obtain in this case. Because it is possible that either the plaintiff could turn to insurance carriers for the satisfaction of her claim or a Pennsylvania court could allow the claim notwithstanding the alleged bar of the nonclaim statute, the court has decided to retain jurisdiction over the case.[4]

B. Applicability of the Pennsylvania Nonclaim Statute

---

[3] Insurance proceeds for automobile liability are a contingent asset; a claim on insurance therefore may not implicate the distribution of the estate at all, or at least in a manner prejudicial to the executor. *See* 31 AM. JUR. 2D *Executors and Administrators* § 574 (2003) ("Some nonclaim statutes make an exception for claims that are covered by insurance, or allow a longer period for filing such claims, on the basis that the estate will not be prejudiced.").

[4] The court clarifies that it is not deciding whether any eventual award will be enforced at a later date. Except to the extent that the *Crosson* decision requires that the court decline jurisdiction when enforcement absolutely cannot be obtained, the merits of the enforcement issue are simply not before the court.

Having decided to retain jurisdiction, the court now turns to the second issue in the case: whether this court should grant extraterritorial effect to the Pennsylvania nonclaim statute to bar the plaintiff's claim of negligence for an accident that occurred within the Commonwealth. For the answer to this question, the court turns, as it must, to the conflicts law of Virginia. *Klaxon Co. v. Stentor Co.*, 313 U.S. 487 (1941). Virginia adheres to the traditional rule of *lex loci delicti* to determine applicable state law. Thus, if the issue at hand dealt exclusively with the standard of care, Virginia's rules would apply. However, the issue does not involve the substantive rules of tort, but rather whether a foreign state's statute that purportedly would limit the remedy should be given extraterritorial effect.

In addition, while the nonclaim statute in question resembles a statute of limitations, Virginia law distinguishes between statutes of limitations and nonclaim statutes. *Cf. Commonwealth v. Owens-Corning Fiberglas Corp.*, 238 Va. 595, 598-99 (1989) (discussing the distinction between statutes of repose and statutes of limitation generally); *Sch. Bd. of the City of Norfolk v. United States Gypsum Co.*, 234 Va. 32, 327-28 (1987) (same). The former is a procedural limitation, and if this case involved the conflict between two statutes of limitations, the Virginia statute most assuredly would predominate based on Virginia's adherence to the rule of *lex fori* in such cases. In this case, for instance, there is no dispute that the claim was brought within two years, which is the statutory period for bringing tort claims in Virginia, and therefore the claim cannot be defeated based on a statute of limitations defense. *See Crosson v. Conlee*, 745 F.2d at 902 (concluding that Virginia statute of limitations for contract causes of actions did not bar breach of contract claim, even in light of foreign nonclaim statute).

The court now returns to the real issue presented by the defense: whether Virginia law would give extraterritorial effect to a foreign nonclaim statute. The court concludes that the nonclaim statute in this case is foreign remedial law and hence would not be given extraterritorial effect in Virginia courts. While the

nonclaim statute can be distinguished from the statute of limitations, both statutes relate to the remedy. In Virginia, courts have determined that the question of remedy is determined by the *lex fori*. *Walters v. Rockwell Int'l Corp.*, 559 F. Supp. 47, 48-49 (E.D. Va. 1983); *Fed. Ins. Co. v. Nationwide Mut. Ins. Co.*, 448 F. Supp. 723, 725 (W.D. Va. 1978); *Maryland v. Coard*, 175 Va. 571, 580-81 (1940) (" 'The broad uncontroverted rule is that the *lex loci* will govern as to all matters going to the basis of the right of action itself, while the *lex fori* controls all that is connected merely with the remedy.' "). The nonclaim statute in this case does not go to the right of action itself; it relates to an area of remedial law independent of the tort law claim advanced by the plaintiff in this case.

Virginia courts have distinguished between probate matters and independent actions that touch upon estate administration. In *Baillio v. Donn*, the petitioners argued that a cause of action to determine ownership of property brought fifteen years after the passing of the decedent was not time-barred. No. CH99-1321, 2000 WL 33595088, at *1 (Va. Cir. Ct. Dec. 21, 2000). The court agreed and held that an action, although barred by probate limitations, may be brought if it did not state a claim against the estate. *Id.* at *2 (noting that the "fundamental question . . . [was] one of title, not possession"). Similarly, a federal court applying Virginia conflicts law determined that distribution of recovery can be separated from the underlying foreign wrongful death statute, which provided the basis for the cause of action. *Walters v. Rockwell Int'l Corp.*, 559 F. Supp. 47, 49-50 (E.D. Va. 1983) That court reasoned that the identity of the beneficiary and the distribution of recovery were remedial law and hence applied Virginia law rather than the intestacy scheme incorporated into the North Carolina wrongful death statute. *Id.* Here, the issue of liability under Virginia torts law is severable from the issue of remedy addressed by the Pennsylvania probate law.[5]

[5] Pennsylvania law also seems to support this dichotomy. *See* 20 PA. CONS. STAT. ANN. § 3389

Given the remedial nature of the Pennsylvania nonclaim statute and the distinction between probate matters and independent actions supported by Virginia law, it is the judgment of this court that Virginia conflicts law would not give extraterritorial effect to the Pennsylvania statute in this case. *Cf. Crosson*, 745 F.2d at 903 ("We are not granting the Florida [nonclaim] statute any extraterritorial application in Virginia . . . ."). Whether the Pennsylvania courts ultimately will enforce this judgment against the estate is, as noted above in the discussion on abstention, a question for another day. *See, e.g., Fox v. Woods*, 392 So. 2d 1118 (Ala. 1980) (rejecting attempt to enforce valid claim established in sister state after applying domestic probate law); *Crosson*, 745 F.2d at 903 ("It is settled law that *enforceability and effect* to be given a judgment against a nonresident executor must be determined by the courts of the state where probate proceedings are pending.").

One could object to the reasoning above by noting that nonclaim statutes and statutes of repose have been treated as substantive in some instances. However, this case is not one in which the claim is predicated upon a foreign cause of action, e.g., a wrongful death statute, and in which the statute supporting that claim limits the time for recovery. *See* 51 AM. JUR. 2D *Nonclaim Statutes* § 105 (2003) (noting that "[t]he most important class of cases [involving nonclaim statutes] consists of those brought in one state *under a statute of a different state, giving a right of action for damages for death or personal injuries* and containing an express limitation of the time for suit as a condition of the right to action") (emphasis added). In such cases, the limitation properly might be determined to be substantive in nature, a limitation on the right itself, and the period of limitation may act as a bar to the claim. Here, however, the

---

(West 2003) (directing that the probate court may make equitable provision for the distribution or satisfaction of claims being litigated in another state or federal court).

plaintiff has sued on the basis of a domestic cause of action. Thus, the nonclaim statute may proscribe the remedy, but not the substantive right itself.

The court concludes that because forum law governs remedies in Virginia, the Pennsylvania statute cannot act to bar a cause of action brought within the Commonwealth and arising under Virginia law at this stage of the proceedings. The defendant's second objection is overruled. Having dispensed with the defendant's objections, the court accepts the magistrate judge's conclusions as herein modified and adopts the recommendation that the defendant's motion for summary judgment be denied.

C. Contributory Negligence

In response to the plaintiff's complaint, the defendant asserted the contributory negligence of the plaintiff in her answer and in a separate counterclaim. The parties have filed a stipulated order voluntarily dismissing the counterclaim. The court adopts the recommendation to enter this agreed order.

With respect to the defendant's assertion of contributory negligence in her answer, the court also adopts the recommendation of the magistrate judge to preclude the assertion of this defense at trial. In light of the stipulated order, the relevant memoranda, and the defendant's failure to raise any substantive objections to the magistrate judge's conclusions, this court agrees with the finding of the magistrate judge that the discovery record cannot support the conclusion that a material fact remains concerning the negligence of the plaintiff. *See* FED. R. EVID. 403. The defendant has voluntarily withdrawn her contributory negligence counterclaim, a claim which was predicated upon the same theory as the defense of contributory negligence pleaded in the answer. Furthermore, the magistrate found no factual basis to support the contributory negligence of the plaintiff. The defendant has admitted primary liability for the accident in question. (Forrester Supplemental Resp. to Reqs. for Admis. ¶¶ 1-3.) Therefore, the only

question to be resolved at trial is the issue of damages. The question of contributory negligence, having been resolved in favor of the plaintiff, has no bearing on this issue.

The Clerk of the Court hereby is directed to send a certified copy of this Order to all counsel of record and to Magistrate Judge Crigler.

ENTERED: _____
Senior United States District Judge

_____
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

LORI ANN FOX,	)	CIVIL ACTION NO. 5:02CV00073
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
BARBARA M. FORRESTER,	)	
Executrix of the Estate of	)	
J. Albert Forrester, Decedent,	)	
	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED, ORDERED, AND DECREED

as follows:

1. The defendant's first objection to the Report and Recommendation, filed August 11, 2003, shall be, and it hereby is, OVERRULED AS MOOT, and the defendant's second and third objections, also filed August 11, 2003, shall be, and they hereby are, OVERRULED.

2. The magistrate judge's Report and Recommendation, filed July 10, 2003, shall be, and it hereby is, ADOPTED IN PART AND MODIFIED IN PART.

3. Pursuant to the parties' Stipulated Order of Dismissal of Counterclaim, filed July 22, 2003, the defendant's counterclaim for contributory negligence, filed on August 8, 2002, shall be, and it hereby is, DISMISSED with prejudice.

The Clerk of the Court hereby is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to Magistrate Judge Crigler and to all counsel of record.

ENTERED:

_____

Senior United States District Judge

_____

Date